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Nos. 84-884 and 84-885

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

NORFOLK & WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in determining to exempt the rail transportation of export coal from regulation under the Interstate Commerce Act on the basis of an undisturbed finding that carriers and shippers have relatively equal bargaining power, the Commission was required to engage in a detailed analysis of the reasonableness of the resulting rates, including a determination of each affected carrier's actual revenue needs, the size of the revenue gains they would likely receive from the exemption, and the degree to which needed revenue gains would be disproportionately subsidized by one group of shippers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a)[1] is reported at 745 F.2d 76. The decision of the Interstate Commerce Commission (Pet. App. 50a) is

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[1] "Pet. App." refers to the appendix to the petition in No. 84-884.

reported at 367 I.C.C. 570. The opinion of the Commission on denial of petitions for stay pending judicial review (Pet. App. 126a-149a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48a-49a) was entered on September 18, 1984. The petitions for a writ of certiorari were filed on December 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

The National Rail Transportation Policy, 49 U.S.C. 10101a, and the exemption authority, 49 U.S.C. 10505, are reproduced at Pet. App. 150a-152a.

STATEMENT

This case concerns the Commission's decision to exempt the rail transportation of coal bound for export from regulation under the Interstate Commerce Act, 49 U.S.C., Subtitle IV, pursuant to its statutory exemption authority, 49 U.S.C. 10505. The history and nature of that authority are described at greater length in the brief for the United States in *Interstate Commerce Commission* v. *Brae Corp.*, petitions for cert. pending, Nos. 84-550 & 84-867.[2] Under Section 10505, the Commission is directed to grant an exemption from some or all provisions of the Act to any class or category of rail traffic where the Commission finds that further regulation is not necessary to carry out the National Rail Transportation Policy (49 U.S.C. 10101a) and is "not needed to protect

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[2] A copy of our brief in *Brae Corp.* has been provided to the parties in this case.

shippers from the abuse of market power." 49 U.S.C. 10505(a).[3]

1. *The Commission's Decision*

After providing notice and receiving numerous comments from interested parties, including five federal agencies, the Commission determined (Chairman Taylor dissenting) that the transportation of coal bound for export should be exempted from regulation under the Interstate Commerce Act.[4] The transportation of coal destined for domestic markets remains regulated. In accordance with the statute, 49 U.S.C. 10505(a), the Commission found first that continued regulation is not necessary to carry out the National Rail Transportation Policy and second that it is not needed to protect shippers from the abuse of market power.

a. *The National Rail Transportation Policy.* The Commission determined, applying the factors set forth in 49 U.S.C. 10101a, that the exemption "will be beneficial to the railroad industry, the export coal industry, and the Nation" (Pet. App. 82a). Not only would the exemption enable rail carriers, which currently are generating insufficient revenues to cover their costs and attract capital (*Railroad Reve-*

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[3] Alternatively, the Commission may exempt transportation or services "of limited scope" (49 U.S.C. 10505(a)(2)(A)); however, the Commission made no such finding in this case (Pet. App. 73a n.37). The exemption authority is also limited in several additional respects not relevant here. See 49 U.S.C. 10505(e) and (g).

[4] Notice and comment procedures are not required under the Act. Compare 49 U.S.C. 10505(a) and (d) with 49 U.S.C. (Supp. IV 1980) 10505(a) and (d). See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 104-105 (1980).

nue Adequacy—1983 Determination, Ex parte 457 (I.C.C. Dec. 17, 1984)), to earn more adequate revenues (Pet. App. 75a), but it would lead to significant operating efficiencies, to the benefit of carriers, shippers, and the public. Principal among these is the increased use of long-term contracts, which "foster efficiency because they provide the flexibility necessary to develop sensitive and innovative rate and service proposals, and the certainty of future business sufficient to justify new investment" (*id.* at 76a). The Commission explained that the current system of maximum rate regulation is a "strong impediment" to negotiated contracts (*id.* at 76a). Moreover, increased pricing flexibility will in itself lead to more "rational ratemaking" (*ibid.*), and the exemption will "free the railroads to arrange intermodal movements where this will prove efficient" (*ibid.*).

For these reasons, the Commission concluded that the coal exemption would promote some seven elements of the National Rail Transportation Policy: the policies of allowing competition and the demand for services to determine rates and services (49 U.S.C. 10101a(1)) (Pet. App. 73a), of minimizing the need for federal regulatory control (49 U.S.C. 10101a(2)) (Pet. App. 73a), of promoting the efficiency of the transportation system and enabling rail carriers to earn more adequate revenues (49 U.S.C. 10101a(3)) (Pet. App. 75a), of aiding the development and continuation of a sound rail transportation system with effective competition to meet the needs of the public and national defense (49 U.S.C. 10101a(4)) (Pet. App. 77a, 78a), of improving coordination among rail carriers and other modes (49 U.S.C. 10101a(5)) (Pet. App. 77a), of encouraging the honest and efficient management of rail-

roads (49 U.S.C. 10101a(10)) (Pet. App. 76a-77a), and of encouraging rail carriers to rely on individual rate increases rather than increases of general applicability (49 U.S.C. 10101a(11)) (Pet. App. 75a n.39).

The Commission also concluded that continued regulation is not needed to carry out any of the remaining elements of the policy (Pet. App. 73a). It focused particularly on the element most stressed by opponents of the exemption, the policy of preventing predatory pricing and practices (49 U.S.C. 10101a (13)) (Pet. App. 75a, 79a-80a).

b. *The abuse of market power.* The Commission also concluded that continued regulation of the transportation of export coal is not needed to protect shippers from the abuse of market power, a finding required under 49 U.S.C. 10505(a)(2)(B). Its conclusion was based on three principal considerations: (i) structure of the market; (ii) recent history of export coal rates; and (iii) existence of alternative safeguards.

(i) *Market structure.* The Commission found (Pet. App. 52a) that "[c]oal exported from the United States is a part of a competitive world coal market made up of large and sophisticated buyers and sellers. * * * [T]his competition effectively restrains the rates charged by rail carriers." [5]

The international coal market is "extremely sensitive" to price changes; United States coal sellers

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[5] It should be noted that the Commission did not determine that railroads have a complete absence of "market dominance" in this area. Carriers without "market dominance" are not subject to maximum rate regulation. 49 U.S.C. 10701a(b)(1). In the context of maximum rate regulation, therefore, the exemption authority comes into play only for carriers that have some degree of market power.

face a market in which, "within fairly close constraints," the price is fixed. Pet. App. 56a. See also *id.* at 74a. The United States share of the market has been steadily declining in recent years, and there is now a substantial international coal surplus. *Id.* at 56a-57a. Because railroads "have a large amount of capital invested in the coal industry on which there will be no return if coal is not produced and moved over their lines" and indeed "depend upon increasing volumes of export coal to amortize their heavy investment and finance new construction" (*id.* at 83a-84a), rail carriers can be expected to set rates at a level that will enable United States coal to compete effectively in world markets. In this, "the railroads' interests closely approximate those of the mines they serve" (*id.* at 84a). Accordingly, while rail rates may increase under an exemption, the Commission concluded—contrary to the arguments of opponents of the exemption—that rates "are unlikely to increase sufficiently to reduce the volume of export coal significantly or to force the mineowners into a situation where their return on investment would be inadequate" (*ibid.*).[6]

Given that the delivered price for export coal is effectively fixed, the Commission analyzed "the issue of the potential for market abuse" in the context of the divisions of economic "rents" between coal producers and railroads (Pet. App. 83a). The Commission used the term "rents" to signify the excess of the delivered price of export coal over the costs (including return on investment) of producing and

[6] The principal argument of opponents of the exemption before the Commission was that railroads, if deregulated, would raise their rates to a point that would reduce overall production for export. Pet. App. 68a-70a.

transporting it. See *id.* at 67a, 74a. Even on the assumption that "most coal mines are served by but a single railroad" (*id.* at 84a), the Commission concluded that "coal exporters are an extremely concentrated industry with sufficient bargaining leverage to prevent unreasonable pricing by the railroads" (*ibid.*). On the basis of geographical competition,[7] intramodal competition,[8] and intermodal competition,[9] the Commission found that rail carriers and export coal shippers have "relatively equal bargaining power" (*id.* at 74a)[10] and that "market competition and natural forces of supply and demand, without interference from this regulatory agency, will establish reasonable and rational rates for this traffic" (*id.* at 74a-75a).

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[7] Foreign purchasers have the option of obtaining coal from several alternative regions of the United States. Thus, a railroad serving a particular area has the incentive to keep rates low and thereby improve the competitive position of its shippers. To the extent that transportation costs render an area uncompetitive, the railroads serving that area would lose traffic. Pet. App. 63a-64a.

[8] Since "for most coal export traffic" the railroad deals not with an individual mine owner, but with a large broker or "transshipper" who owns or controls the output of many mines in different areas, the railroad is unable to set prices unilaterally. The transshipper is able to shift production from mine to mine (and railroad to railroad) in response to railroad pricing decisions. Pet. App. 84a-85a.

[9] Competition from motor carriers and (particularly) barges, and potential competition from coal slurry pipelines, also restrain railroad pricing. Pet. App. 85a.

[10] See also Pet. App. 132a ("the presence of sizable transshippers possessing substantial bargaining leverage assures substantial parity between the parties in negotiating rate contracts"); *id.* at 137a ("there appears to be substantial equality of bargaining power between shippers and carriers in the export coal market").

The Commission acknowledged that there would be variation in bargaining power among particular cases. "In some cases the shipper will have more leverage; the converse will be true in others" (Pet. App. 86a n.67; see *id.* at 66a-67a). While finding that shippers and carriers have "relatively equal bargaining power" in most cases, the Commission noted that "even in the rare instance" where a particular carrier might have significant leverage over a small shipper it serves, it would be contrary to the carrier's interests to raise prices to the point that the volume of traffic suffers (*id.* at 85a-86a).

(ii) *Recent history of export coal rates.* The Commission found that the "history of rail export coal pricing behavior supports the premise * * * that the railroads' export coal prices are constrained by strong delivered price competition and that railroads are dealing with customers who have substantial bargaining power" (Pet. App. 64a). Prior to 1980, "not a single maximum rate complaint concerning export coal was filed with the Commission" (*ibid.*).[11] Coal export rates were increased, at most, in connection with general rate increases for all traffic; indeed, railroads " 'flagged out' of several general rate increases on export coal, presumably due to competitive factors" (*ibid.*). This history contrasts sharply with

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[11] As part of the Staggers Rail Act of 1980, Congress determined that any then-existing rail rates that had not been challenged as of 180 days from the date of its enactment would thereafter be conclusively presumed lawful. Section 229(b) of the Staggers Act, 49 U.S.C. 10701a note. This created an incentive for the immediate filing of complaints. Passage of the Act triggered the filing of over 800 maximum rail rate complaints, among which were complaints challenging most export coal rates. These complaints are now pending before the Commission. See Pet. App. 64a.

that of the transportation of coal bound for domestic markets, where there were "substantial increases" and "extensive litigation before the Commission" challenging the reasonableness of rates (Pet. App. 64a). Further, between 1969 and 1974, minehead prices increased 468% while export coal rail rates rose only 57%; adjusted for inflation, coal prices increased two and one half times between 1969 and 1982, while rail rates increased by less than half. *Id.* at 65a. While the index of materials costs for eastern export coal carriers rose 93% between 1975 and 1981, their export coal rates rose only 82% (*ibid.*). The Commission concluded (*ibid.*):

> These results indicate at a minimum that the unregulated shippers of export coal have considerable bargaining power in the contest over division of the economic rents from export coal. * * * This history indicates that the pricing restraint of rail carriers was not the result of the exercise of regulatory power by this Commission, but rather resulted from the play of market forces.

(iii) *Alternative safeguards.* Finally, the Commission noted the existence of two alternative safeguards that would "protect against any abuse of market power" (Pet. App. 87a). First, the antitrust laws would "provide[] assurance that levels of rates and services for exempt transportation do not become unreasonable" (*ibid.*). Second, "the railroads know that if they engage in any abuse of market power, [the Commission] may revoke" the exemption and restore regulation (*ibid.*). "This will be a strong incentive to the carriers not to abuse their market power even if a particular railroad were to develop sufficient leverage to be able to do so" (*ibid.*).

2. *The court of appeals' opinion*

The court of appeals vacated the exemption decision and remanded to the Commission "for any further proceedings that may be appropriate" (Pet. App. 47a).[12] The court first reviewed (Pet. App. 11a-26a) the Commission's factual findings regarding market structure and rail pricing history, including evidence presented by opponents of the exemption (and summarized by Chairman Taylor in dissent) that conflicts with the Commission's findings. While not affirming the Commission's findings, the court of appeals did not declare them arbitrary or capricious; it left them undisturbed. Those findings therefore constitute the factual predicate for this case.

The court next discussed at length (Pet. App. 27a-34a) the absence of any finding by the Commission that the coal export railroads have "no market power" or that there is "effective competition." See note 5, *supra*. The court acknowledged in a footnote (Pet. App. 28a n.18), however, that the Commission is authorized under 49 U.S.C. 10505 to grant an exemption from regulation even where the affected carriers possess market power and there is an absence of "effective competition." The standard, as the Commission has held (Pet. App. 82a) and the court agreed (*id.* at 28a n.18), is whether in the absence of regulation there would be an "abuse of market power" (49 U.S.C. 10505(a)(2)(B)). See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 105 (1980) ("The bill permits exemptions wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition.").

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[12] The export coal exemption has been in effect since September 12, 1983. The court of appeals' mandate is stayed pending this Court's action on the petitions for certiorari.

The court then turned to the Commission's analysis of the National Rail Transportation Policy, 49 U.S.C. 10101a. The court observed that the Commission had "discussed how the exemption would further a number of the policy provisions" (Pet. App. 34a), but did not state what those findings were or hold that they were arbitrary or capricious. The court observed (*ibid.*) that the Commission "hardly mentioned" 49 U.S.C. 10101a(6), which establishes a policy of "maintain[ing] reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system." However, the court concluded (Pet. App. 36a n.22) that "the failure to discuss the section explicitly is not in itself fatal" and that the "reasonable rate" policy of Section 10101a (6) is included within the concept of "abuse of market power" as it appears in the exemption provision, 49 U.S.C. 10505(a)(2)(B) (see Pet. App. 39a). The court thus reasoned that the Commission's "explanation" of how an exemption would be consistent with the "reasonable rate" policy is to be found in its "more general analysis of the 'abuse of market power' provision" (*id.* at 36a).

With respect to the "abuse of market power," the court held, as a "legal, not a factual question" (Pet. App. 27a) that the Commission's "understanding" of the statutory term "abuse of market power" is erroneous. See Pet. App. 47a. Although the Commission did not explicitly define "abuse of market power," the court discerned in its opinion the following "standard" (Pet. App. 37a):

> so long as coal shippers are not forced to reduce production (*i.e.*, so long as the rail rate leaves them a share of the revenue that covers their costs, including their costs of capital) and so

> long as they are not wholly excluded from any economic rents above that level, their rate is "reasonable" and there is no "abuse of market power."

The court rejected this purported "standard" and accordingly vacated the decision.

The court stated that "[t]he rate reasonableness provision of Section 10101a(6) and the 'abuse of market power' provision of Section 10505(a)(2)(B) should be read as reflecting the policies of the statutory scheme of which they are a part" (Pet. App. 44a), and inferred that "[p]rotecting the revenues of shippers who face carriers with market power was an essential goal, though not the only goal, of the compromise that produced the Staggers Act" (*ibid.*).

Specifically, the court faulted the Commission (Pet. App. 44a-45a) for relying on competitive factors without "explain[ing] why reliance on them is sufficient to protect those interests of shippers" and for referring to the policy of promoting railroad revenue adequacy without determining (*id.* at 45a)

> the actual revenue needs of the carriers involved or the size of the revenue gains they would likely receive from the exemption, or the degree to which needed revenue gains would be disproportionately subsidized by one group.

It was not sufficient, according to the court (*id.* at 46a), for the Commission to determine that "competitive factors" would guarantee that the "division of rents would * * * equal some undisclosed balance that would constitute a condition of reasonable rates and nonabuse of market power"; the Commission had to "explain in nonconclusory terms how much competition was necessary, or what condition would constitute one of reasonable rates and nonabuse of market power."

ARGUMENT

Congress has declared it to be the national policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" and "to minimize the need for Federal regulatory control over the railroad transportation system." 49 U.S.C. 10101a (1) and (2). The exemption authority, 49 U.S.C. 10505, is "an important cornerstone" of that policy. H.R. Rep. 96-1035, 96th Cong., 2d Sess. 79 (1980). Congress intended the exemption authority to reflect a "totally new approach to the railroad industry" in which "competitive factors [would] be of paramount and exclusive importance" (126 Cong. Rec. 28431 (1980) (Rep. Staggers)). The Commission was charged with "actively pursuing exemptions" (H.R. Rep. 96-1035, *supra*, at 60), and directed to remove "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers." H.R. Conf. Rep. 96-1430, *supra*, at 105. Congress viewed the exemption authority as "experimental" and "innovative" (H.R. Rep. 94-725, 94th Cong., 1st Sess. 243 (1975)); it freed the Commission to implement exemptions, and to revoke them, without even notice and comment procedures. H.R. Conf. Rep. 96-1430, *supra*, at 104-105. Through use of the revocation power, Congress urged the Commission to "adopt a policy of reviewing carrier actions after the fact to correct abuses of market power" (*id.* at 105).

The court of appeals has seriously misunderstood the nature of the Staggers Act exemption authority, and has announced legal standards that, if not reversed, would make it virtually impossible for the Commission to implement the provision in the man-

ner Congress intended. Where Congress provided for a sharp break from the regulatory principles of the past century, the court insisted on reading those principles back into the exemption provision; where Congress envisioned a flexible and experimental approach toward deregulation, the court imposed onerous additional substantive requirements. The difficulty created by the judgment below arises from the fact that it was expressly predicated on a "legal, not a factual, question" (Pet. App. 27a). The court's construction of the Staggers Act exemption authority therefore will apply to all future exemption cases. This is especially troubling since all such cases may be brought in the District of Columbia Circuit. 28 U.S.C. 2343. Because of the importance of the Staggers Act exemption authority to Congress's effort to revitalize the railroad industry by eliminating unnecessary and inefficient regulation, the decision warrants this Court's review.[13]

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[13] The United States has also recommended that the Court grant petitions for certiorari in *Brae Corp.* v. *ICC, supra,* a case involving the Commission's boxcar exemption. The two cases present similar issues under different legal rubrics. Both cases involve the division of economic rents after deregulation, and in both cases the District of Columbia Circuit imposed additional requirements on the Commission, derived from other sections of the Interstate Commerce Act. In *Brae,* the court concluded that the National Rail Transportation Policy impliedly incorporated protections for small short haul carriers contained in 49 U.S.C. 10705a. Here, the court concluded that both the Policy and the "abuse of market power" standard impliedly incorporate the rate reasonableness standards of 49 U.S.C. 10707a(e)(2)(B). See Br. for the United States in *Brae.*

As in *Brae,* if the petitions in this case are granted, the Commission and the United States undertake to file a joint brief on the merits.

The Commission addressed both of the statutory prerequisites to granting an exemption under 49 U.S.C. 10505, and concluded that further regulation of the rail transportation of export coal is not needed to carry out the National Rail Transportation Policy or to protect shippers from the abuse of market power. Pet. App. 73a. The Commission's determination that an exemption would promote some seven of the 15 elements of the transportation policy, without being inconsistent with any (see pages 3-5, *supra*), was virtually ignored by the court.[14] The basis for the court's decision was that the Commission's "understanding" of the statutory phrase "abuse of market power" is deficient (Pet. App. 47a). We submit that the court misconstrued the Commission's decision and that, more importantly, the interpretation of the "abuse of market power" standard adopted by the court is erroneous and unworkable.

1. In determining that continued regulation is not necessary to prevent abuses of market power, the Commission did not enunciate a comprehensive defini-

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[14] The court's only comment (Pet. App. 34a-35a) on the Commission's extensive discussion of the National Rail Transportation Policy was that the Commission gave insufficient attention to the policy of maintaining reasonable rates where there is an absence of effective competition and where rail rates provide revenues that exceed the amount necessary to maintain the rail system and to attract capital (49 U.S.C. 10101a(6))—a policy that would appear, by its terms, to apply with full force only when the rail carriers involved are receiving adequate revenues. It is undisputed that none of the rail carriers involved here is in that category. In any event, the judgment of the court did not rest on this ground (Pet. App. 36a n.22), in part because, as the court correctly noted (*id.* at 36a, 39a), the Commission's analysis of this policy element was subsumed within its "abuse of market power" discussion.

tion of "abuse of market power"; nor has it done so in other exemption cases. The Commission did indicate that, at one extreme, a railroad would abuse its market power if it forced a shipper out of the market or appropriated all of the economic rents from the movement of coal to the export market (Pet. App. 79a, 83a, 85a). However, the Commission never stated that this was the limit of the concept of "abuse of market power." Since it found, in this case, that export coal shippers and carriers have "relatively equal bargaining power" and that "market competition and natural forces of supply and demand, without interference from this regulatory agency, will establish reasonable and rational rates for this traffic" (Pet. App. 74a-75a; see pages 6-7, *supra*), there was no occasion for the Commission to decide the outer limits of the statutory standard.[15] We submit that these findings, not disturbed by the court of appeals, were fully adequate under the exemption provision. Cf. *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981).

However, the court apparently concluded that these findings were legally insufficient to support an exemption.[16] The Commission must, according to the

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[15] We therefore will not address whether the court of appeals was correct that the term "abuse of market power" necessarily implies a degree of shipper protection in excess of that needed as a matter of allocative efficiency, *i.e.*, to ensure that there is no inefficient reduction in output. Cf. *Chesapeake & O. Ry.* v. *United States*, 704 F.2d 373, 376 (7th Cir. 1983). The Commission has not taken a position on that difficult issue and it is not necessary for a decision in this case.

[16] The court in fact never referred to these findings. The full context of the court's opinion indicates, however, that rather than overlooking the findings the court deemed them insufficient as a matter of law.

court (Pet. App. 46a), "explain in nonconclusory terms how much competition was necessary, or what condition would constitute one of reasonable rates and nonabuse of market power."

The court is demanding precision where it is neither possible nor appropriate. To ask how much competition is enough is like asking how many trees it takes to make a forest. If, as the Commission found, competitive forces are strong enough to prevent unreasonable rates (Pet. App. 75a, 84a), then they are strong enough to satisfy the statutory standard. The Commission explained at length why competitive forces in the market could be expected to maintain export coal rail rates at a reasonable level. The analysis similar in precision and degree of quantification to other exemptions approved by the Commission, including exemptions upheld on judicial review. See *Brae Corp.* v. *ICC*, 740 F.2d 1023, 1039-1040 (D.C. Cir. 1984), petitions for cert. pending on other grounds, Nos. 84-550 & 84-867 (boxcar traffic exempted from maximum rate regulation on the basis of predictions by the Commission of a "generalized nature" regarding "con[s]traints on market abuse," as well as the recent history of rates, which showed that "market abuse was rare, if not non-existent" and that this was attributable to "market forces," not to the Commission's "maximum rate prescriptions"); *American Trucking Ass'ns* v. *ICC*, *supra* ("piggyback" traffic exempted on the basis of similar considerations).

Indeed, the court's insistence on knowing how much competition is enough would make it impossible for the Commission to rely, as it did here, on general market structure and historical patterns of reasonable rates to determine that further regulation is not

needed. As explained in the statement (at 8-9), export coal rail rates over the past 15 years have been remarkably restrained (increasing less than rates on general traffic), "not [as] the result of the exercise of regulatory power by this Commission, but rather [as a result of] the play of market forces" (Pet. App. 65a). The Commission quite reasonably concluded that if regulation was not needed to restrain rates in the past, it probably would not be needed in the future. Such a determination should not be overturned merely because the Commission did not quantify how much competition there is or how much there should be.

The court of appeals also took issue with the legal "standard" it perceived the Commission to apply to the question of abuse of market power. However, the "standard" the court discerned in the Commission's opinion—an "indifference" to the division of profits above the level sufficient for both shippers and carriers to cover their costs and attract capital (Pet. App. 37a-38a; see pages 11-12, *supra*)—nowhere appears in that opinion.

The court explained that the Commission's "understanding" of the statutory exemption "emerged" from the Commission's discussion of the various competitive elements in the market (Pet. App. 12a-13a). However, the court ultimately concluded that the legal standard underlying the Commission's decision is "only indirectly related" to the competitive factors from which it supposedly emerged (Pet. App. 27a, 45a-46a). But if this legal "standard" is not enunciated in the Commission's opinion and is, by the court's own admission, of doubtful relation to the Commission's analysis, we are left to wonder why the court persisted in attributing it to the Commission.

The court's misunderstanding evidently arises from the Commission's discussion of the principal arguments presented by opponents of the exemption. The opponents contended, in summary, that if exempted from regulation the export coal carriers would increase rates to the point that volume would be reduced (Pet. App. 69a-70a) and that they would "appropriate most of the available rents" (*id.* at 69a). Since these were the principal arguments, it is understandable that the Commission's opinion would contain frequent responses to them—*e.g.*, that "the railroads will not price their services so as to reduce American coal production" and that they would not "appropriate all of the economic rents" from the export coal business (quoted by the court at Pet. App. 37a).

But the Commission made clear (Pet. App. 85a) that it is only in the "rare instance" that the railroad would be able to exercise this degree of market power. In the ordinary case, the bargaining power of the parties will be "relatively equal," with the shipper having the advantage in some instances, the carrier in others. The court plainly erred in deriving the Commission's legal standard from its discussions of the exceptional case.

2. Far more important to the Commission's ability to comply with its exemption mandate in future cases is that the court substituted an "abuse of market power" standard of its own, which is utterly unworkable and at variance with congressional intent.[17]

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[17] If the court was not able to determine what legal standard the Commission employed, it should have remanded to the Commission for clarification. See *Yonkers* v. *United States*, 320 U.S. 685 (1944). It is not the task of a reviewing court to construe a complex regulatory provision, involving accom-

The exemption authority, 49 U.S.C. 10505, is stated in broad terms; the standards for its use are explicit and the exceptions narrow and specific. The standards admittedly are not self-defining; they require both interpretation by the Commission and the balancing of conflicting elements of the National Rail Transportation Policy. But the statute does not invite a court to engraft upon the exemption provision any limitations other than those apparent on its face. See 126 Cong. Rec. 28431 (1980) (emphasis added) (statement of Rep. Staggers) (Section 10505 "would permit the exemption of any provision in the act, except as specified *in the exemption section*"). The court of appeals, however, specifically rejected exclusive reliance on the factors set forth in the exemption provision or by reference in the National Rail Transportaton Policy, and held that those standards "should be read as reflecting" the policies of other sections of the Interstate Commerce Act (Pet. App. 44a).

The court turned, specifically, to various sections of the Interstate Commerce Act that are designed to "[p]rotect[] the revenues of shippers who face car-

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modation of conflicting policies, in the first instance. Cf. *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956); *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

The court of appeals professed itself unable to defer to the Commission's interpretation of the "abuse of market power" standard because the Commission "did little to explain, in terms of the statute's language, structure, or history, why the concerns for protecting shippers from carrier monopoly were met by that standard" (Pet. App. 40a n.23). However, the failure of the Commission to articulate a justification for its "standard" is entirely attributable to the fact that it did not adopt any such "standard." Surely no elaborate explanation was needed to show that when shippers and carriers have "relatively equal bargaining power," there is no likelihood of an "abuse of market power."

riers with market power" (Pet. App. 44a), taking into consideration the revenue needs of railroads (*id.* at 41a-44a).[18] It gave special attention to the Long-Cannon Amendment to the Staggers Act, 49 U.S.C. 10707a(e)(2)(B), which establishes standards for judging the reasonableness of rates in light of the various potential revenue sources of the carrier. See Pet. App. 42a-44a. The "underlying logic" of these "Long-Cannon factors," as the court pointed out (Pet. App. 43a), is "that monopolistic discrimination should not be used to generate funds that could more efficiently and equitably be recovered elsewhere." Accordingly, the court required that the Commission, before granting an exemption from maximum rate regulation, must analyze the "actual revenue needs of the carriers involved," the "size of the revenue gains they would likely receive from the exemption," and "the degree to which needed revenue gains would be disproportionately subsidized by one group" (Pet.

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[18] The court found, looking at the language and legislative history of various provisions of the Act, that two factors—effective competition and revenue adequacy—were both "the reasons for deregulation" and *"the limits of deregulation"* (Pet. App. 41a (emphasis in original)). However, the conference committee report on the Staggers Act explicitly noted that the Commission may grant exemptions "wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition." H.R. Conf. Rep. 96-1430, *supra*, at 105. This demonstrates that Congress did not view the presence of "effective competition" as a "limit" on deregulation, and did not consider the absence of "effective competition" as an indication that there would be an abuse of market power. And there is no reason to suppose that revenue adequacy is a "limit" on deregulation either; that would imply, illogically, that when and if railroads become revenue adequate the full panoply of Interstate Commerce Act restrictions must be reimposed.

App. 45a). These are among the elements of a maximum rate case. See 49 U.S.C. 10707a. In effect, the court has required the Commission to determine that, if an exemption is granted, the resulting rates will conform to present regulatory standards of rate reasonableness, including the Long-Cannon factors.

This interpretation of the exemption authority is inconsistent with the congressional objective. The court improperly shifted the focus from whether continued maximum rate regulation is desirable to whether an unregulated market will guarantee the same results as maximum rate regulation. This assumes that Congress intended deregulation only where it would lead to no change in actual outcomes. Congress, however, formally determined that many rail regulations "have become unnecessary and inefficient" and that "a greater reliance on the marketplace is essential" to a sound transportation system (Staggers Act § 2(4) and (9), 49 U.S.C. 10101a note). The Staggers Act, in Rep. Staggers' words, was "intended to send a message to both the ICC and the courts that this law * * * is to be construed as the first step toward treating the American railroad industry as any other business, which is best 'regulated' by the marketplace." 126 Cong. Rec. 28431 (1980). Accordingly, the Commission was instructed to evaluate proposed exemptions against the standards of Sections 10101a and 10505(a), which have a strongly deregulatory emphasis. Moreover, the Commission was instructed to protect against abuses of market power "by reviewing carrier actions after the fact" under the revocation authority (H.R. Conf. Rep. 96-1430, *supra*, at 106; see *Brae Corp.* v. *ICC*, 740 F.2d at 1043; *American Trucking Ass'ns* v. *ICC*, 656 F.2d at 1127). The court of appeals here utterly ignored

the revocation authority, which is central to an understanding of the experimental approach to exemptions Congress envisioned.

Under the court's circular reasoning, any provision of the Interstate Commerce Act would be deemed to be needed (unless competitive forces would fully replicate it), since the "underlying logic" of each provision is impliedly incorporated in the exemption standards. To "read [the exemption standards] as reflecting the policies of the statutory scheme of which they are a part," as the court of appeals demanded (Pet. App. 44a), is to deny the exemption provision its intended role as an instrument for "experimental" and "innovative" policy *change*. See H.R. Rep. 94-725, *supra*, at 243.

The court's specific application of this reasoning is equally troubling. The key practical problem is that the court would require the Commission to base its exemption decisions on factors that can be determined only on a case-by-case basis. According to the court (Pet. App. 45a), the Commission must examine the revenue needs of *each* carrier affected by the exemption; it must predict, for *each* carrier, how much revenue it would receive if the exemption is granted. Finally, it must determine, with respect to each carrier, whether export coal shippers would bear a "disproportionate" share of the carrier's revenue needs. This would entail examining each carrier's rates and services not only in the export coal market, but in every market the carrier serves. Such a task is simply not feasible.

Some idea of the complexity of the analysis the court has prescribed can be gleaned by looking at individual rate reasonableness proceedings involving the Long-Cannon analysis. *E.g., Public Service Co. of In-*

diana v. *ICC*, 749 F.2d 753 (D.C. Cir. 1984); *Potomac Electric Power Co.* v. *ICC*, 744 F.2d 185 (D.C. Cir. 1984). To say that such proceedings are complicated and protracted understates the case. Yet the court of appeals here would require the equivalent of simultaneous such proceedings for each of the hundreds of rates affected by an exemption. Even presuming that the court does not intend the inquiry to be conducted at the level of detail associated with an actual rate case, the project is of immeasurable complexity.

There is no legal basis for engrafting the standards and methodology of an individual rate case onto an exemption decision. Indeed, it is demonstrably contrary to congressional intent. Prior to 1980, the exemption authority was limited to transportation or services "of limited scope" (49 U.S.C. (Supp. IV 1980) 10505). That limitation was removed by the Staggers Act, precisely to enable the Commission to make exemptions of broad scope. It would be quite inconsistent to hold that the Commission must engage in an analysis that is appropriate only to individual rates. Further, in 1980 Congress removed the requirement that the Commission must give notice and conduct an informal rulemaking proceeding before granting an exemption. Although the legislative history does not explicitly explain the purpose of this change, it evidently was intended to make exemption decisions easier, more flexible, less encumbered. It would be quite inconsistent to hold that the Commission must engage in the tortuous process of determining the reasonableness of rates for the entire affected industry before issuing an exemption decision. Moreover, Congress created the revocation authority precisely to enable the Commission to act experimentally in the face of uncertainty; to deregulate

now and to correct any abuses that may occur "after the fact" by means of carefully-tailored revocations. *American Trucking Ass'ns* v. *ICC*, 656 F.2d at 1127; see *Brae Corp.* v. *ICC*, 740 F.2d at 1043. It would be quite inconsistent to hold that the Commission must determine, in advance, each of the rates that are likely to result from deregulation, and whether they are reasonable.

The court's interpretation is also contrary to administrative practice. In each of its exemption decisions, the Commission has relied on an analysis of competitive factors in the market and on its experience with the services in question to determine whether, in the given case, continued regulation is necessary to carry out the National Rail Transportation Policy or to protect shippers against an abuse of market power. Never has the Commission engaged in a rate reasonableness analysis (complete with Long-Cannon factors) before exempting a commodity from maximum rate regulation. The Commission has confined its analysis to the factors listed by Congress in Sections 10101a and 10505. This consistent administrative practice is entitled to deference. *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 27-28; *Udall* v. *Tallman*, 380 U.S 1, 16-17 (1965).

Finally, the decision below is inconsistent with a decision by the only court of appeals other than the District of Columbia Circuit to review an exemption decision. In *American Trucking Ass'ns* v. *ICC*, *supra*, the Fifth Circuit upheld the decision on the basis of the Commission's analysis of market factors and the congressional intention that the exemption power be used vigorously and experimentally. The court noted that Congress intended the Commission to "ex-

ercis[e] its exemption authority in the face of uncertainty as to the effect of an exemption," and to " 'review[] carrier actions after the fact to correct abuses of market power' " (656 F.2d at 1127, quoting H.R. Conf. Rep. 96-1430, *supra*, at 105). In contrast, the court of appeals here totally disregarded the evidence that export coal rates have in fact been restrained by market forces in the recent past, found the Commission's analysis of competitive constraints legally irrelevant, and failed even to acknowledge the existence of the Commission's revocation power.

CONCLUSION

The petitions for a writ of certiorari should be granted and the cases consolidated for argument.

Respectfully submitted.

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